

No. 77-1773

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

PRUNE BARGAINING ASSOCIATION, ET AL., PETITIONERS

v.

**BOB BERGLAND, SECRETARY OF AGRICULTURE OF
THE UNITED STATES, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**MEMORANDUM FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners, representing a number of independent prune producers, brought suit against the Secretary of Agriculture and seven prune "handlers" engaged in the business of storing and packaging prunes. They alleged that the handlers' practice of exchanging reserve for saleable prunes was not authorized by the Agricultural Marketing Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, and the prune marketing order issued thereunder. The district court granted the Secretary's motion for summary judgment.¹ The court of appeals affirmed.

¹Petitioners assert (Pet. 2) that the grant of summary judgment deprived them of a jury trial and violated the Due Process Clause. It has long been settled, however, that summary judgment procedures comport with the Constitution. *Galloway v. United States*, 319 U.S. 372.

1. In 1937, Congress enacted the Agricultural Marketing Act, the purpose of which is to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce. 7 U.S.C. 602. To carry out this purpose, Congress delegated to the Secretary of Agriculture broad power to regulate and control the handling of certain commodities and to provide for the control and disposition of surpluses by establishing reserve pools. 7 U.S.C. 608c(6)(D) and (E). Congress authorized the Secretary to issue "marketing orders," which regulate the "handlers" of specified agricultural commodities, including prunes. 7 U.S.C. 608c(1) and (2). After notice and an opportunity for a hearing, the Secretary is empowered to issue such orders as will tend to effectuate the declared policy of the Act. 7 U.S.C. 608c(3) and (4). Marketing orders are implemented by local agencies or "committees," approved by the Secretary, and governed by his regulations. 7 U.S.C. 608c(7)(C).

At issue here is Prune Marketing Order No. 993, which regulates the handling of prunes grown in California. The order requires handlers, when the estimated annual crop production exceeds the estimated trade demand, to set aside in reserve a previously determined percentage of prunes received from the producers. The purpose of the order is to minimize disruptive market conditions caused by overproduction. The daily administration of the order is carried out by the Prune Administrative Committee, composed of 21 members of the California prune industry—14 producers and 7 handlers (Pet. App. B-3 to B-5). Section 993.65 of the order, 7 C.F.R. 993.65(a), provides the Committee with the "power and authority to * * * dispose of any and all reserve prunes * * *" and stipulates that offers to sell reserve prunes "shall be governed by the provisions of a sales agreement, executed by the handler with the committee." 7 C.F.R. 993.65(b).

Under the sales agreement, in years when the reserve program is in effect, each lot of prunes delivered by a producer to a handler is separated into reserve and saleable prunes based upon a percentage set by the Secretary after considering the Committee's recommendation. The reserve percentage applies to every variety, grade and size prune in the handler's inventory (Pet. App. B-8). While the saleable prunes are paid for immediately, the reserve prunes are not paid for until the end of the year when the Committee, after liquidation of the reserve, distributes sale proceeds to the producers (Pet. App. B-18).

As the crop year progresses, certain categories of saleable prunes become scarce. When this occurs, the contract permits the handler to draw prunes from the reserve in order to meet the supply requirements of buyers. These reserve prunes are replaced by adding to the reserve pool some otherwise saleable prunes of other sizes or grades that have not been sold. Though this exchange mechanism flexibility in meeting trade demand is assured (Pet. App. B-8, B-15).

2. Petitioners argue that the exchange mechanism is not authorized by the Act or the marketing order. This is not a question of general importance. Nor is it one about which the courts of appeals are in conflict. The challenged provision of the agreement merely implements, in a particularized way, the broad powers given to the Secretary of Agriculture to regulate commerce in commodities through the issuance of marketing orders. See 7 U.S.C. 608, 608c(1); *Lewes Dairy, Inc. v. Freeman*, 401 F. 2d 308 (C.A. 3.) certiorari denied, 394 U.S. 929.

The Agriculture Marketing Act, in 7 U.S.C. 608c(6)(D), plainly gives the Secretary power to determine the extent of surplus of any commodity, "or of any grade, size, or quality thereof," and to control the disposition of this

surplus. The Secretary has interpreted the reserve provisions of the Act as providing for the "disposition [of prunes] in an orderly manner so as to maximize total sales of prunes and returns to producers." 30 Fed. Reg. 6788. The exchange provision in the sales agreement meets this objective by providing for the sale in the normal course of trade of those reserve prunes which are in demand and which, if left in the reserve, would ultimately be disposed of in outlets bringing in a lesser financial return. At the least, the Secretary's interpretation of the Act is entitled to great weight. *Udall v. Tallman*, 380 U.S. 1, and, in the absence of evidence that Congress has rejected his construction, his action should be upheld. See *Zuber v. Allen*, 396 U.S. 168.

Petitioners insist that the exchange provision conflicts with Section 993.56 of the order, 7 C.F.R. 993.56. It is there provided that the reserve shall "approximate the average marketable content of a handler's receipts," i.e., that the reserve shall reflect the varieties, grades and sizes of prunes found in the handler's saleable inventory. Since the average marketable content of the reserve is altered by the exchange of prunes, petitioners contend that the exchange provision contravenes the law. The short answer to this contention is that the order expressly provides that the reserve obligation of a handler may be diminished by quantities of prunes "disposed of by him under a sales contract of the committee" (7 C.F.R. 993.57(c)), or "for which he is otherwise relieved by the committee of such responsibility." 7 C.F.R. 993.57(e). Moreover, in promulgating the order, the Secretary recognized that (30 Fed. Reg. 6788):

[i]t is impractical to state in the order or herein all of the terms and conditions which may be needed in the sales agreement. The agreement can be readily adapted to the needs of an outlet and to the marketing conditions existing at the time.

The provision in the sales agreement for the exchange of saleable and reserve prunes to meet trade demand obviously furnishes the flexibility in meeting market conditions that is the sales agreement's intended purpose.²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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²Petitioners also assert that the marketing agreement eliminates the provision of 7 C.F.R. 993.65(c) requiring that the committee refrain from making an offer to sell reserve prunes, either to handlers or other persons, until five days after it has filed with the Secretary complete information about the terms and conditions of the proposed offer, or until the Secretary has indicated that he does not disapprove of the offer. There is nothing in the record, however, that establishes that this provision was not complied with in this case. Moreover, as indicated above, the Secretary has recognized that marketing agreements must be flexible and adaptable to changing market conditions. The exchange provision embodied in the marketing agreement is designed to take advantage of favorable market conditions and thus furthers the purposes of the Secretary's order.